

JUN 30 1976

MICHAEL RODAK, JR., CLERK

in the
Supreme Court
of the
United States

OCTOBER TERM 1975

No. 75-1918

PETER JOSEPH SALERNO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

MAX P. ENGEL, ESQ.
1461 N.W. 17th Avenue
Miami, Florida

Counsel for Petitioner

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in the
Supreme Court
of the
United States

OCTOBER TERM 1975

No. _____

PETER JOSEPH SALERNO,

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vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

The Petitioner, Peter Joseph Salerno respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 4, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, was entered on June 1, 1976. A timely Petition For Rehearing was denied on June 1, 1976, and this Petition For Writ Of Certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1.

WHETHER PETITIONER WAS DENIED DUE PROCESS AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE GOVERNMENT FAILED TO PROVIDE DISCOVERY INCLUDING "BRADY" MATERIAL AND THE COURT REFUSED TO GRANT PETITIONER TIME TO FILE PRE-TRIAL MOTIONS CONCERNING ISSUES RAISED BY THE DISCOVERY.

2.

WHETHER PETITIONER WAS DENIED HIS RIGHT TO AN EFFECTIVE APPEAL AS WELL AS DUE PROCESS OF LAW WHEN

THE COURT HELD A SECRET IN-CHAMBERS HEARING CONCERNING THE CO-DEFENDANT WHERE THERE EXISTED A STRONG LIKELIHOOD THAT THE CO-DEFENDANT WHO WAS A GOVERNMENT INFORMER WAS ON TRIAL FOR THE SOLE PURPOSE OF IMPLICATING PETITIONER.

STATUTORY PROVISIONS INVOLVED

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the wit-

nesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On June 20, 1975, by indictment, Petitioner PETER JOSEPH SALERNO, Ralph Carmine Grandinetti and Walter Thiel Shaw were charged with Conspiracy To Violate the narcotic laws in violation of 21 U.S.C. § 841(a)(1).

The indictment further charged Possession Of Cocaine With Intent To Distribute And Distribution (App.).

A fourth count charging a firearms violation was dismissed.

On July 9, 1976, Petitioner was arraigned, pled not guilty and was granted twenty days for filing motions. (App.) In addition, the standing discovery order was entered. (App.).

None of the discovery ordered had been provided to Petitioner's counsel prior to the trial date of August 25, 1975.

Counsel for the Government contended that the written portion of the discovery was available from his secretary.

Counsel for Petitioner contended that it was necessary to receive the discovery directly from the Assistant United States Attorney so that the material could be explained

and questions concerning confidential informants, Brady material and other matters could be inquired into.

Counsel for Petitioner moved for a continuance on the ground that the Government's failure to provide discovery in a timely fashion prevented Petitioner from filing defensive motions. The Court denied the motion for a continuance.

On August 26, 1975, Petitioner was found guilty by a jury as to Counts one, two and three.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND ACTS TO DENY PETITIONER DUE PROCESS OF LAW.

The failure of the Government to provide discovery in time for the preparation of a defense and the refusal of the trial court to grant a continuance of sufficient duration to accomplish the above clearly deprived Petitioner of a fair trial.

Availability to Defendants of certain evidence gathered by the prosecution and police agencies are an essential part of due process of law.

This Honorable Court in a long series of cases, most notably *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giles v. Maryland*, 386 U.S. 66,

87 S.Ct. 793, 17 L.Ed.2d 737 (1967); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1954); *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957) and *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935); has held that the failure of the prosecution to make known to defense counsel exculpatory and other evidence constitutes a denial of due process and requires reversal of a conviction.

Other rules and statutes require an even broader scope of discovery to be made available to the defense. Rule 16, Federal Rules of Criminal Procedure, Jencks Act 18 U.S.C. 3500.

In the Southern District of Florida a standing discovery order is entered in all criminal cases (App.). This order incorporates all of the above rules and makes it unnecessary to file discovery motions in most cases.

In the case at bar, the Government did nothing to make discovery available prior to trial. The prosecutor advised the Court on the day of the trial that a secretary in his office would have made some material available to counsel.

The Petitioner suffered severe prejudice as a result of the failure to provide discovery. At the very least Petitioner would have been entitled to a severance from the co-defendant Shaw, who revealed from the witness stand that he was a salaried informant for several law enforcement agencies at the time of the alleged crime. Shaw's testimony was the most damaging to Petitioner of any witness who testified. Several other matters which would be discoverable were not revealed to counsel in time to be the subject of motions.

Courts of Appeals in other circuits have consistently held that not only is the purpose of the prosecution's duty to disclose evidence to the defense to prevent surprise by the prosecution with new evidence at trial, but also to constitute the trial a "search for the truth" through the use of relevant material much of which is in the hands of the Government. *U. S. v. Bryant*, 439 F.2d 642 (DC, Cir., 1971), see also: *U. S. v. O'Connor*, 237 F.2d 466 (2nd Cir., 1956).

The Government is under an affirmative duty to provide the Defendant with all of the discovery to which he is entitled.

II.

THE PETITIONER WAS DENIED DUE PROCESS AND AN EFFECTIVE APPEAL BY THE FAILURE OF THE COURT REPORTER TO TRANSCRIBE AN IN-CHAMBERS HEARING HELD IN THE ABSENCE OF PETITIONER OR HIS COUNSEL.

Immediately prior to the commencement of the trial, Counsel for the co-defendant Shaw made the following statement to the Court. (Transcript #7, App.).

In behalf of the Defendant Shaw there have been developments in the last two weeks absolutely beyond my control which make it necessary for me to make a motion to withdraw, and a motion for continuance on behalf of Mr. Shaw. I discussed it with Mr. Nahoon. And for very good rea-

sons I would like a Chambers hearing on this matter so I could make these facts known to the Court and Mr. Shaw can make them known to the Court. I think Mr. Nahoon already knows most of them. It's a very sound motion and I ask for a five minute chambers hearing on the motion.

The transcript contains the following notation at Page 8 (App.):

Thereupon the proceedings pertaining to Defendants Grandinette and Shaw having taken place, said proceedings were recorded but *not* transcribed . . .

As stated elsewhere in this petition, co-defendant Shaw admitted that he was a confidential informant for the Florida Department of Law Enforcement. (The arrests in this case were made by local police officers).

Of particular importance to Petitioner is the fact that the in-chambers hearing concerning Shaw was not transcribed. Such failure to transcribe clearly denied Petitioner his right to an adequate and effective appeal. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956).

The omission denies Petitioner his right to an appeal in two ways, first because of the relationship between the co-defendant and the involved law enforcement agencies there is a strong likelihood that what transpired in-chambers would give rise to defense of entrapment.

If such entrapment was proveable Petitioner would have a right to discover the information and also he would

be entitled to a motion for severance. Rule 14, Federal Rules of Criminal Procedure and *U. S. v. Robinson*, 432 F.2d 1348 (D.C., Cir., 1970).

There is no question that the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. *Schaffer v. United States*, 362 U.S. 511, 516, 80 S.Ct. 945, 948 (1960).

Second, the law in the Fifth Circuit is clear that there is a continuing obligation on the part of the prosecutor to provide Defendant with any information discoverable by the defendant of which he is unaware. *U. S. v. James*, 495 F.2d 434 (5th Cir., 1974), *United States v. Hildebrand*, 506 F.2d 406 (5th Cir., 1975).

Any information bearing on Shaw's employment by the Florida Department of Law Enforcement would have been material to Petitioner's use of an entrapment defense or of his impeachment of Shaw.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

LAW OFFICES OF MAX P. ENGEL
Attorneys for Petitioner
1461 N.W. 17th Avenue
Miami, Florida

BY _____
MAX P. ENGEL

CERTIFICATION

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Writ of Certiorari was mailed to the Solicitor General's Office, Washington, D.C., and the United States Attorney's Office, 300 Ainsley Building, Miami, Florida, this 29th day of June, 1976.

OF COUNSEL

APPENDIX

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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM 1975

NO. _____

PETER JOSEPH SALERNO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A
WRIT OF CERTIORARI

App. 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. FL 75-51-Cr-NCR

21 USC § 846
M/S 15 years — \$25,000
+ Special Parole Term
not less than 3 years
21 USC § 841(a)(1)
M/S 15 years — \$25,000
+ Special Parole Term
not less than 3 years
18 USC § 924(c)(2)
M/S not less than 1 year
nor more than 10 years
18 USC § 2

UNITED STATES OF AMERICA

vs.

RALPH CARMINE GRANDINETTI
PETER JOSEPH SALERNO
WALTER THIEL SHAW

INDICTMENT

Filed June 20, 1975.

App. 3

The Grand Jury charges that:

COUNT I

From on or about January 8, 1975, up to and including January 9, 1975, at Broward County, in the Southern District of Florida, the defendants,

RALPH CARMINE GRANDINETTI
PETER JOSEPH SALERNO
WALTER THIEL SHAW

did wilfully, knowingly, and unlawfully combine, conspire, confederate, and agree with each other and with divers other persons to the Grand Jury unknown to commit an offense against the United States, to-wit: to violate Section 841(a)(1) of Title 21, United States Code.

It was part of said conspiracy that the defendants would knowingly and intentionally possess with intent to distribute and distribute a quantity of cocaine, a Schedule II narcotic controlled substance.

The Grand Jury further charges that the defendants, in furtherance of and to effect and achieve the unlawful goals of the conspiracy, did, at or about the times and places hereinafter referred to, commit certain overt acts, among which are the following:

OVERT ACTS

1. On or about January 8, 1975, at Ft. Lauderdale, Florida, RALPH CARMINE GRANDINETTI asked Ser-

App. 4

geant Donald Bower, Broward County Sheriff's Department, if he would care to purchase a quantity of cocaine;

2. On or about January 9, 1975, at approximately 12:30 a.m. RALPH CARMINE GRANDINETTI, PETER JOSEPH SALERNO, and WALTER THIEL SHAW met with Sergeant George DeCarlo and Sergeant Donald Bower, Broward County Sheriff's Department, at 6317 S.W. 33rd Street, Miramar, Florida;

3. On or about January 9, 1975, at approximately 12:30 a.m., at 6317 S.W. 33rd Street, Miramar, Florida, WALTER THIEL SHAW delivered a quantity of cocaine;

4. On or about January 9, 1975, at approximately 12:30 a.m., at 6317 S.W. 33rd Street, Miramar, Florida, PETER JOSEPH SALERNO made a statement about the cocaine WALTER THIEL SHAW delivered.

5. On or about January 9, 1975, at approximately 12:30 a.m., at 6317 S.W. 33rd Street, Miramar, Florida, PETER JOSEPH SALERNO was carrying a gun.

All in violation of Title 21, United States Code, Section 846.

COUNT II

On or about January 8, 1975, or January 9, 1975, at Broward County, in the Southern District of Florida, the defendants,

RALPH CARMINE GRANDINETTI
PETER JOSEPH SALERNO
WALTER THIEL SHAW

App. 5

did knowingly and intentionally possess with intent to distribute a controlled substance, to-wit: approximately 9 ounces of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT III

On or about January 8, 1975, or January 9, 1975, at Broward County, in the Southern District of Florida, the defendants,

RALPH CARMINE GRANDINETTI
PETER JOSEPH SALERNO
WALTER THIEL SHAW

did knowingly and intentionally distribute a controlled substance, to-wit: approximately 9 ounces of cocaine, a Schedule II narcotic controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT IV

On or about January 9, 1975, at Broward County, in the Southern District of Florida, the defendants,

RALPH CARMINE GRANDINETTI
PETER JOSEPH SALERNO
WALTER THIEL SHAW

did, in committing the offenses set forth in Counts I, II and III above, which are felonies prosecutable in a court of the United States, knowingly and unlawfully carry a fire-

App. 6

arm, to-wit: a Browning 9 mm. pistol, serial number T260705; in violation of Title 18, United States Code, Sections 924(c)(2) and 2.

A TRUE BILL

/s/ Stephen Squire

FOREMAN

ROBERT W. RUST
UNITED STATES ATTORNEY

By: /s/ Kerry J. Nahoom

KERRY J. NAHOOM
Assistant United States Attorney

App. 7

NOTICE OF COUNSEL & ARRAIGNMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. FL-75-51-CR-NCR
(Filed July 10, 1975)

UNITED STATES OF AMERICA

v.

PETER SALERNO

The defendant, Peter Salerno, appeared before United States Magistrate PETER R. SALERMO on July 9, 1975. The following was accomplished:

Counsel was appointed

Name _____

Address _____

City _____ State _____

Phone _____

Defendant is to retain private counsel and appear before the U.S. Magistrate on _____

_____, unless counsel files notice of appearance on or before the above date.

App. 8

xx Defendant was arraigned and a plea of not
guilty was entered. Trial date is set for 8/25/75.
20 days were allowed to file defensive motions.

xx Bond was set for the defendant, in the amount
of \$100,000.00 O/R. Order to enter.

Date July 9, 1975

/s/ Robert S. Beasley

Clerk, for U.S. Magistrate

cc: Clerk for Judge
U.S. Attorney
U.S. Marshal
Probation
U.S. Magistrate

App. 9

STANDING DISCOVERY ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. _____

UNITED STATES OF AMERICA

v

Good cause appearing, it is

ORDERED AND ADJUDGED that on or before
_____, the parties shall confer and
the following shall be accomplished.

A. The government shall permit the defendant to
inspect and copy the following items or copies
thereof, or supply copies thereof which are
within the possession, custody or control of
the government, the existence of which is
known or by the exercise of due diligence
may become known to the government:

(1) Written or recorded statements made by
the defendant.

- (2) The substance of any oral statement made by the defendant before or after his arrest in response to interrogation by a then known to be government agent which the government intends to offer in evidence at trial.
- (3) Recorded grand jury testimony of the defendant relating to the offenses charged.
- (4) The defendant's F.B.I. arrest record.
- (5) Books, papers, documents, photographs, tangible objects, buildings or places which the government intends to use as evidence at trial to prove its case in chief or were obtained from or belong to the defendant.
- (6) Results or reports or physical or mental examinations, and of scientific tests or experiments, made in connection with this case.
- (7) Upon receipt of a notice of alibi defense (See paragraph B(4) infra.) the government shall give the defendant written notice of the specific time date and place at which the offense or alleged conspiratorial overt act in which the defendant is named is alleged to have been committed. Thereafter, upon receipt of the witness list referred to in Paragraph B(4) infra, the government shall give the defendant a written list

of names and addresses of the government witnesses who will establish the defendant's presence at the scene of the alleged offense or conspiratorial overt acts in which the defendant is named.

- B. The defendant shall permit the government to inspect and copy the following items or copies thereof, or supply copies thereof which are within the possession, custody or control of the defendant, the existence of which is known or by the exercise of due diligence may become known to the defendant.
 - (1) Books, papers, documents, photographs tangible objects which the defendant intends to introduce as evidence in chief at the trial.
 - (2) Any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case which the defendant intends to introduce as evidence in chief at trial or which were prepared by a defense witness who will testify concerning the contents thereof.
 - (3) If a defendant intends to rely upon the defense of alibi he shall give written notice thereof, to the government. Upon receipt of the information referred to in Paragraph A(8) above, the defendant shall inform the government in writing of the specific place at which he claims to have been at the time of the

elleged offense or alleged conspiratorial overt acts in which he is named, and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

- (4) If a defendant intends to rely upon the defense of insanity at the time of the alleged crime or intends to introduce expert testimony relating to a mental disease, defect or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall give written notice thereof to the government.
- C. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *BRADY v MARYLAND*, 373 U.S. 83 (1963).
- D. The parties shall make every possible effort in good faith to stipulate to all facts or points or law the truth and existence of which is not contested and the early resolution of which will expedite the trial.
- E. The parties shall collaborate in preparation of a written statement to be signed by counsel for each side, generally describing all discovery material exchanged, and setting forth all stipulations made by defense counsel at the conference shall be used against the de-

fendant unless the stipulations are reduced to writing and signed by the defendant and his counsel. This statement, including any stipulations signed by the defendant and his counsel, shall be filed with the Court within five days following the conference.

It shall be the continuing duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of this Standing Order.

Upon sufficient showing the court may at any time upon motion properly filed, order that the discovery or inspection provided for by this Standing Order be denied, restricted or deferred, or make such other order as is appropriate. It is expected by the Court, however, that counsel for both sides shall make every good faith effort to comply with the letter and spirit of this Standing Order.

All motions concerning matters not covered by this Standing Order must be filed pursuant to Local Rule 10G, within _____ day of this order.

DONE AND ORDERED at Miami, Florida, this ____ day of _____ 19____.

UNITED STATES MAGISTRATE

cc; U.S. Attorney

The above is certified to be a correct and true copy of the original.

/s/ Robert S. Beasley

Date: 2/4/76

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

No. FL-75-51-CR-NCR

United States of America
v.

PETER JOSEPH SALERNO

On this 29th day of September, 1975 came the attorney for the government and the defendant appeared in person and¹ by Counsel, Harold Keefe Esq.

IT IS ADJUDGED that the defendant upon his plea of² Not Guilty, and having been found Guilty by a Jury has been convicted of the offense of Conspiracy, to possess and intentionally distribute a controlled substance, to-wit: approx. 9 ounces of cocaine, a Schedule II narcotic sub-

¹Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

²Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

stance; in violation of Title 21, USC, Section 841(a) (1) and Title 18 USC, Section 2. as charged³ in Count 1 2 and 3. and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ FIVE (5) YEARS, plus a Special Additional Parole Term of THREE (3) YEARS, as to Count 1, or until otherwise discharged by due process of law, it being further

ORDERED that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period SIX (6) YEARS, plus a Special Parole Term of THREE (3) YEARS, as to Count 2, or until otherwise discharged by due process of law, it being further

ORDERED that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX (6)

³Insert "in count(s) number" if required.

⁴Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

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YEARS, plus a Special Parole Term of THREE (3) YEARS, and to Count 3, or until otherwise discharged by due process of law, it being further

ORDERED that Counts 1, 2 and 3 are to run Concurrently and it is further

Recommended that the hereinabove sentence is to run Concurrently with any State Sentence the Defendant is presently serving., it being further

ORDERED that execution of Sentence of Conf. be deferred to Oct. 16, 1975.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant. it being further

ORDERED that the defendant shall report to the institution designated by the Bureau of Prisons by 10:00 A.M. October 16, 1975

/s/ Norman C. Roettger Jr.

NORMAN C. ROETTGER JR.
United States District Judge.

The Court recommends commitment to⁶

Clerk.

⁵Enter any order with respect to suspension and probation.

⁶For use of Court to recommend a particular institution.

App. 17

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-3817
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

PETER JOSEPH SALERNO,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

(May 4, 1976)

BEFORE COLEMAN, GOLDBERG and GEE,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.¹

*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

¹See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966

App. 18

[TITLE OMITTED]
(JUN 1, 1976)

ON PETITION FOR REHEARING

Before COLEMAN, GOLDBERG and GEE,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

[TITLE OMITTED]

(Filed June 1, 1976)

ORDER :

(XX) The motion of appellant for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

() The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been

App. 19

filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

- () The motion for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.
- () IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ THOMAS GIBBS GEE

UNITED STATES
CIRCUIT JUDGE

[3] THE COURT: Mr. Clerk, let's begin calendar call, please.

THE CLERK: United States of America versus Ralph Carmine Grandinette, Peter Joseph Salerno, Walter Thiel Shaw.

MR. NAHOOM: Kerry Nahoom on behalf of the Government.

Mr. Engel, is your client present?

THE COURT: Mr. Grandinette present? Where is Mr. Grandinette? Where is Mr. Engel?

Mr. Engel, is your client present?

MR. ENGEL: Yes, Your Honor.

THE COURT: Mr. Keefe?

MR. KEEFE: Good Morning, Your Honor.

THE COURT: Your client present, sir?

MR. KEEFE: Yes, Your Honor, he is.

THE COURT: Ready to go to trial?

MR. NAHOOM: Government is ready, Your Honor.

THE COURT: Mr. Shaw is present and Mr. Aiken is here.

MR. KEEFE: Yes, Your Honor.

Your Honor, Magistrate Palermo granted me 20 days to file motions from the time I got the Standing Discovery Order and to this date I haven't gotten a Standing Discovery Order.

[4] I had planned to file a motion to dismiss along with the motion for severance and a motion to suppress and I haven't had an opportunity to file these because I have never gotten a Standing Discovery Order.

Mr. Nahoom was out on vacation for a couple of weeks and I don't know whether there was a mixup with the

Magistrate's office or this office, but I think in all candor with the Court my client would be—

THE COURT: It can't be this office because I don't enter the Standing Discovery Order.

MR. KEEFE: No. I understand that.

I don't feel my client would be adequately represented unless I file some motions before trial.

THE COURT: Mr. Nahoom?

MR. NAHOOM: Discovery has been made fully available to all defendants in this case.

MR. KEEFE: I believe what happened, his secretary called and said if you'd like to come up some day, you can look at the discovery, but Mr. Nahoom was out of town.

MR. NAHOOM: Judge, it's been made available.

[5] THE COURT: Mr. Nahoom doesn't have to be there while you read it.

MR. KEEFE: It was only what his secretary represented what the discovery was. I have no idea, because I never got the Standing Discovery Order in the case.

Your Honor, he is out on bond, so I don't feel that there is any prejudice by an additional two or three weeks.

MR. NAHOOM: Judge, the Government objects to the motion. There is no basis for it.

As far as discovery, it has been made fully available for a great number of days. I left specific instructions when I left that discovery would be made on an open file basis.

THE COURT: Mr. Keefe, if you didn't avail yourself of it, I don't see how you can complain.

A motion to dismiss may be considered at any time.

MR. KEEFE: Your Honor, the point is the additional motions rather than the standing discovery. For instance, the motion to dismiss, and I think there is a very valid point on the motion to dismiss, because the state arrested these defendants [6] and let the 180 day speedy trial rule run and then turned it over to the federal government because the state lost jurisdiction to try it. I think that there is a good argument for the Court on that. I'd like to file a motion based on that, and I think Mr. Engel would join in the motion.

THE COURT: That motion may be made at any time. Besides, the state and federal are separate jurisdictions as you well know.

MR. KEEFE: I understand that.

THE COURT: We are not bound by the state rules.

MR. KEEFE: I understand.

There may be an argument on collateral estoppel since all of the actions were taken by state authorities on the violations and they filed the charges and they let the 180

days run and because they couldn't try it, they then came to the Federal Government to file the charges.

THE COURT: This is one of those rare instances where I did sign the Standing Discovery Order, signed the 9th of July. I don't know why you didn't receive it, Mr. Keefe.

MR. KEEFE: If I had, Your Honor, I would have filed the other motions.

[7] THE COURT: You know the procedure. You can't sit back and not do anything and not come up when you are invited to come look at the discovery and then claim foul. Your motions are denied.

We will pick a jury and go to trial first off in this case.

MR. ENGEL: Well, Judge, I have a change of plea, if Your Honor would want to take it at this time. I have discussed it with the Government.

Would you care to take it at this time or pass it? I'd like to get it done, if Your Honor would.

THE COURT: The first time I've heard about it.

MR. AIKEN: In behalf of the Defendant Shaw, there have been developments in the last two weeks absolutely beyond my control which make it necessary for me to make a motion to withdraw, and a motion for continuance on behalf of Mr. Shaw. I discussed it with Mr. Nahoom. And for very good reasons I would like a Chambers

hearing on this matter so I could make these facts known to the Court and Mr. Shaw can make them known to the Court. I think Mr. Nahoom already knows most of them. It's a very sound motion and I ask for a five-minute Chambers [8] hearing on the motion.

THE COURT: I will have the hearing in Chambers after I complete the calendar. We will still pick a jury and take the plea sometime later and we will still pick a jury and go on this matter.

MR. ENGEL: You will take the plea after the calendar call?

THE COURT: Sometime after that. I don't want to keep the jurors waiting around.

[Thereupon, the proceedings pertaining to Defendants Grandinette and Shaw having taken place, said proceedings were recorded but not transcribed and the following proceedings were had:]

THE COURT: Counsel are present and defendants are present.

I just wanted to go over the matter of selecting a jury.

Gentlemen, I think most of you are old hands about picking a jury before me. I will ask the questions from the Federal Judicial Center suggested questions, basically from that list.

I am going to give a total of 11 challenges for the defendant. You gentlemen will work out how you are going to exercise them and who

[11] eight, nine, ten, eleven and twelve.

Anything further?

MR. KEEFE: Before we started I wanted to put in the record my motion for continuance, and as the basis, according to the order by Judge Palermo, that I would have twenty days to file motions from the time I received the Standing Discovery Order and I never received it and therefore I don't feel because of the action of either the Government or the Magistrate's court, my client is adequately prepared to go to trial at this time.

THE COURT: Denied for the reasons stated earlier.

Okay, gentlemen, we are ready to begin.

You want to bring in the jury.

[Thereupon, a jury and two alternates were selected, after which time the following proceedings were had:]

THE COURT: Ladies and gentlemen, those of you who are in the jury box in this case, you are going to get a little extra long lunch hour today, because you can tell I am about to select another jury at 1:30 and I have another matter to take care

No. 75-1918

Supreme Court, U. S.

FILED

OCT 8 1976

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

PETER JOSEPH SALERNO, PETITIONER

v.

UNITED STATES OF AMERICA

***ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT***

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was not afforded adequate opportunity for discovery and that an *in camera* conference dealing with a co-defendant should have been transcribed.

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess and distribute cocaine (Count 1), possession of cocaine with intent to distribute (Count 2), and distribution of cocaine (Count 3), in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to concurrent terms of five years' imprisonment on Count 1 and six years' imprisonment on Counts 2 and 3, to be followed by three years' special parole (Pet. App. 14-16). The court of appeals affirmed without opinion (Pet. App. 17).

The evidence showed that on January 8, 1975, undercover police officers Donald Bower and John DeCarlo met

with Ralph Grandinette at the Fort Lauderdale airport (Tr. 31, 81-82).¹ During that meeting, Grandinette stated that he would sell the two officers forty-four ounces of cocaine for \$44,000 (Tr. 36, 85). He also stated that the two individuals who then had possession of the cocaine had thirty-five ounces in solid form and an additional nine ounces left from a prior aborted transaction (Tr. 35, 85). It was agreed that Bower and DeCarlo would first purchase the nine ounces, with the larger quantity to be purchased later (Tr. 36, 85).

As agreed, Bower and DeCarlo went to Grandinette's home later that night, where they met petitioner and co-defendant Walter Shaw (Tr. 38, 87-88). Upon Grandinette's instructions, Shaw handed Bower nine plastic bags containing cocaine (Tr. 38, 89). Petitioner and Shaw then discussed the sale of the remaining thirty-five ounces of cocaine with Bower (Tr. 39-40, 90-92). Petitioner explained that the nine ounces of cocaine had been packaged in one-ounce bags for a prior transaction that had not been completed (Tr. 41). He stated that the remaining quantity would be in solid rock form (Tr. 75). Petitioner, Shaw and Grandinette were arrested shortly thereafter (Tr. 42-43).

Petitioner and co-defendant Shaw testified that they were at Grandinette's house during the transaction in order to rob Bower and DeCarlo, rather than to sell narcotics (Tr. 141-147, 152, 168-174, 182-185). Both denied ever possessing or distributing cocaine (Tr. 147, 178, 182). According to petitioner and Shaw, they were arrested before they could carry out the planned robbery (Tr. 146-147, 180-181).

¹On August 25, 1975, Grandinette pleaded *nolo contendere* to Count 1 of the indictment, which charged that he had conspired to possess and distribute cocaine, in violation of 21 U.S.C. 846.

1. Petitioner's contention (Pet. 5-7) that he was not afforded adequate opportunity for discovery is directly refuted by the record. At the time of petitioner's arraignment on July 9, 1975, the Magistrate entered an order requiring that all pretrial motions be filed within twenty days of that date and setting trial for August 25, 1975 (Pet. App. 7-8). Also on July 9, 1975, the district court signed a discovery order requiring the government to make available to the defense specified materials to which the defense was entitled (Pet. App. 9-13, 23). Following the arraignment, counsel for the government notified petitioner's counsel that the discovery materials were available in his office and that the attorneys representing the defendants could look at the materials at their convenience (Pet. App. 21). But during the approximately seven-week period following petitioner's arraignment and preceding the beginning of trial, neither petitioner's counsel nor petitioner—who had been released on bond (Pet. App. 21)—availed themselves of the opportunity to inspect the materials.

In these circumstances, the court was wholly justified in denying petitioner's motion, made on the morning of trial, for a continuance for discovery purposes. As the court properly pointed out to petitioner's counsel in denying the motion, "[y]ou can't sit back and not do anything and not come up when you are invited to come look at the discovery and then claim foul" (Pet. App. 23).

2. Petitioner's contention (Pet. 7-9) that he was denied due process and the effective assistance of counsel on appeal because an *in camera* hearing dealing with a co-defendant was not transcribed is similarly without merit. Immediately prior to trial, co-defendant Shaw's counsel moved for leave to withdraw from the case and for a continuance (Pet. App. 23). He also requested a conference

in chambers to permit him to explain to the court the reasons for his motion. The conference, which was held shortly thereafter, was recorded but not transcribed (Pet. App. 24).²

Petitioner now speculates that had the *in camera* conference been transcribed he might have learned facts enabling him to raise an entrapment defense. He bases this speculation on the fact that Shaw later testified at trial that he had been an informant for the Florida Department of Law Enforcement. But if petitioner believed that an entrapment defense might be available to him, and that facts disclosed during the *in camera* conference might have buttressed that defense, he could himself have ordered the untranscribed portion of the record. His counsel also could have cross-examined Shaw in an effort to establish the predicate for an entrapment defense. Instead, his counsel did not exercise his right to cross-examine Shaw, who testified in his own defense and, as noted, was convicted with petitioner. Finally, if petitioner believed that he needed a transcript of the *in camera* conference on appeal, he could have placed an order at that time for a transcribed copy of the *in camera* proceedings, Rule 10(b), Fed. R. App. P.³

²Although the proceedings at the *in camera* conference were recorded, the Court Reporter Act, 28 U.S.C. 753(b)(1), requires reporters to record only those "proceedings in criminal cases had in open court." See *United States v. Jenkins*, 442 F. 2d 429, 438 (C.A. 5).

³Petitioner is represented in this Court by retained counsel, as he was in the courts below. *Griffin v. Illinois*, 351 U.S. 12, upon which petitioner relies (Pet. 8), requires that indigent defendants be provided with a sufficient record to pursue adequate appellate review. Petitioner is not indigent, and *Griffin* is therefore inapposite.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.